IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO.: 2358/2017

In the matter between:

GMSA FINANCIAL SERVICES:	
A DIVISION OF WEST BANK:	
A DIVISION OF FIRST RAND BANK LIMITED	Plaintiff

and

PBF INVESTORS (PTY) LTD	First Defendant
YONGAMA TSHONA	Second Defendant

REASONS FOR JUDGMENT

MBENENGE JP

[1] On 22 May 2018, after hearing oral argument, I granted summary judgment confirming the cancellation of an instalment sale agreement for the purchase of a motor vehicle concluded by and between the plaintiff[1] and the first defendant, and directing the first defendant to return the motor vehicle to the plaintiff.[2] The order I granted on 22 May 2018 reads as follows:

---

[1] Despite the fact that this is an application, the parties will bear the appellations used in the main action and will thus be referred to as "*the plaintiff*" and "*the defendants.*"

[2] The order is dated "*21 May 2018*", which obviously came about through inadvertence, as the matter had been heard in the unopposed motion court on Tuesday, 22 May 2018, and not Monday, 21 May 2018.

"1. Summary judgment is entered in favour of the plaintiff in that:

1.1 The cancellation of the agreement entered into between the plaintiff and first defendant is confirmed;

1.2 The first defendant [shall] return the vehicle more fully described as a **2015 Isuzu KB 205 D-TEQ** motor vehicle bearing ***engine number*** **4JK1ML 2758** and ***chassis number*** **ADMHRECR2CR2C4718083** to the plaintiff, failing which the ***Sheriff*** is authorised, directed and empowered to attach, seize and hand over the vehicle to the plaintiff.

2. The plaintiff's claim for damages is postponed *sine die.*

3. Costs of suit, inclusive of the reserved costs of **7 November 2017** on the **opposed scale** shall be borne by the first defendant.

4. Reasons for this order will be delivered upon a written request therefor being made, such request to be made within 7 *days* from today."

[2] Without first seeking reasons for the order, and approximately some 6- and-a-half months after the order had been granted,[3] the defendants launched an application for leave to appeal[4] based on various grounds, all of which, in my view, constituted a diatribe of some 10 pages criticizing the order,[5] and making wild surmises and accusations regarding the reasoning underpinning the order. Thereafter, the defendants did not apply for a date for the hearing of the leave to appeal application.

[3] The Registrar set the matter down for hearing on 20 February 2019 and, after attempts by the defendants to unilaterally remove the matter from the roll had proved

[3] On 17 February 2019.
[4] That step was preceded by the filing of record of a "*notice of application for condonation of filing late the leave to appeal*" on 12 December 2018, served on the plaintiff's attorneys on 07 January 2019.
[5] In the words of Leach J in *Songono v Minster of Law and Order* 1996 (4) SA 384 (E) at 385 C-D.

futile, I heard the parties on that day. Due to the premature launch of the leave to appeal application in the circumstances outlined above, I struck the matter off the roll, but granted the defendants leave to request the reasons for the order granted last year, despite their having failed to timeously do so. That stance on my part was informed by the duty the court has towards litigants to furnish reasons for the orders it grants,[6] the fact that the order is final in nature and the determination evinced by the defendants to appeal the order.

[4] In *Mphahlele*[7] Goldstone J held:

> "[12] There is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in terms of s1 of the Constitution, the rule of law is one of the founding values of our democratic state, and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal, or where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too that where a decision is subject to appeal, it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer."

[5] It has also been held that the core principles of the rule of law include the right of a litigant to be given reasons by a court. "*Absent such a right, transparency is cloaked in darkness, accountability is honoured in the breach*."[8]

[6] Against this background, let me turn to provide the reasons.

---

[6] *Mphahlele v First National Bank of South Africa Ltd* [1999] ZACC 1; 1999 (2) (SA) 667; 1993 (3) BCLR 253 (CC).

[7] *Supra*; also see *Strategic Liquor Services v Mvumbi N.O. & Others* 2010 (2) SA 92 (CC), para [15], where the court said:

> "It is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing, and, when a judgment is appealed, written reasons are indispensable. Failure to supply them will usually be a grave lapse of duty, a breach of litigants' rights, and an impediment to the appeal process."

[8] *Per* Davis J in *M v M* (20350/2012) [2015] ZAWCHC 197 (24 November 2015).

[7] The plaintiff, a duly incorporated commercial bank and credit provider, issued summons against the first and second defendants on 29 May 2017. The first defendant is cited as "*PBF INVESTORS (PTY) LTD a company duly registered in accordance with the company laws of the Republic of South Africa*" with its chosen *domicilium citandi et executandi* at 11 Sobukwa Street, Northcrest, Mthatha, and the second defendant "*YONGAMA TSHONA… whose domicilium citandi et executandi address and employment address are situate at 11 Sobukwa Street, Northcrest, Mthatha.*"

[8] It is alleged, in the plaintiff's particulars of claim, that the plaintiff duly represented by its authorised agent and the first defendant[9] duly represented by the second defendant, concluded a written instalment sale agreement in terms whereof the first defendant purchased a 2015 Isuzu KB 205 D-TEQ[10] on 27 March 2015 (the sale agreement).

[9] According to the particulars of claim, the material terms of the sale agreement were, *inter alia*, the following:

(a) the total amount payable by the first defendant to the plaintiff would be the sum of R432 330.48 payable by way of 72 monthly instalments of R6 004.59, with effect from 27 March 2015;

(b) ownership of the motor vehicle would continue vested in the plaintiff until payment by the first defendant of all amounts payable under the sale agreement; and

---

[9] Annexure "*B1*" to the particulars of claim mentions the name of the debtor as being "*PBF Investors (Pty) Ltd – 2012/089815/07*", with company registration number "*2012/089815/07*" and *domicilium et executandi* "*11 Sobukwa Street North Crest Mthatha.*"

[10] With engine number 4JK1ML2758, chassis number ADMHRECR2C4718083 and registration letters and number HRS 210 EC (the motor vehicle).

(c) in the event of the first defendant defaulting in the punctual payment of any instalment or any other amount due in terms of the sale agreement, the plaintiff acquired the right, *inter alia*, to-

(i) claim immediate payment of the value of the full balance outstanding and all other amounts then owing in terms of the sale agreement; or

(ii) immediately terminate the agreement, obtain immediate possession of the motor vehicle, retain all payments already made in terms of the sale agreement by or on behalf of the first defendant and claim damages.

[10] It is further alleged that the first defendant took delivery of the motor vehicle in terms of the sale agreement, but defaulted and breached its obligations in that it failed to pay instalments which fell due on 25 March 2017, and fell in arrears in the sum of R40 581.77, resulting in the total balance outstanding as at the time of the launch of the action being R262 571.42.

[11] Paragraph 22 of the particulars of claim reads:

> "22. On the 27th of March 2015 the Second Defendant entered into an Agreement of Suretyship with Plaintiff in terms whereof the Second Defendant in writing bound himself as surety *in solidum* and co-principal debtor for the punctual payment of all sums due by the First Defendant to Plaintiff."

[12] The usual allegations pertaining to sections 129 and 130[11] of the National Credit Act 34 of 2005 have been made in the particulars of claim, and the relief sought is:

---

[11] In the relevant part the sections read:

"129. (1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that

"1. An order cancelling the Agreement;

2. Repossession of the motor vehicle, if found;

3. Payment of the difference between the balance outstanding in the amount of R262 571.42 as at the 25th of March 2017 and the appraised value of the motor vehicle, if found;

4. Interest on (3) above, at the fixed nominal rate of 14.25% per annum calculated from the 26th of March 2017 to date of payment;

5. Collection charges;

6. Costs of suit in respect of the First Defendant and costs on the attorney and own client scale in respect of the Second Defendant."

[13] After the defendants had entered their appearance to defend the action on 21 June 2017, the plaintiff issued notice of application for summary judgment against the first defendant, for:

"(a) An order cancelling the agreement;

(b) repossession of the motor vehicle;

(c) costs of suit in respect of the First Respondent/Defendant;

(d) collection charges",

alleging that the defendants lacked a *bona fide* defence to the action and that notice of intention to defend had been delivered solely for the purpose of delay.

---

the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and

(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before-

(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and

(ii) meeting any further requirements set out in section 130.…

130. (1) Subject to subsection (2), a credit provider may approach the court for an order to enforce a credit agreement only if, at that time, the consumer is in default and 25 has been in default under that credit agreement for at least 20 business days and-

(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86(9), or section 129(l), as the case may be;

(b) in the case of a notice contemplated in section 129(l), the consumer has-

(i) not responded to that notice; or

(ii) responded to the notice by rejecting the credit provider's proposals; and

(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127."

[14] Besides delivering a notice in terms of rule 30(2) of the Uniform Rules of Court lamenting about the illegibility of the copy of the sale agreement annexed to the particulars of claim, which was subsequently cured by the plaintiff delivering a more legible copy, the defendants opposed the summary judgment application. The relevant opposing affidavit is deposed to by Mr Yongama Tshona *qua* director of the first defendant, acknowledging his citation as second defendant in the main action. He contends, in relation to the claim against the first defendant that-

(a) the sale agreement is not binding, in as much he claims not to have signed the same and that the initials appearing thereon ("*YV*") and those at the bottom of the relevant document are not his;

(b) the *merx* has not been sufficiently described;

(c) the amount claimed is grossly inflated, especially if one has regard to the value of the motor vehicle; and

(d) whilst "*the nature of the agreement between the plaintiff and the first defendant is the credit agreement as correctly averred in the relevant paragraphs of the particulars of claim*", there has been non-compliance with section 129 of the National Credit Act in that the letter envisaged by the section was transmitted to him only 5 days before the issuing of summons.

[15] The summary judgment application has had a long and winding history, having been postponed on 5 previous occasions.[12] On 25 July 2017 it was, *per* Dawood J, postponed to 15 August 2017 with costs being in the cause; on 15 August 2017 Griffiths J postponed the application to 29 August 2017; on 29 August 2017 Jaji AJ (as he then was) postponed the application to 05 September 2017 with costs being in the cause; on 05 September 2017 Dawood J once again postponed the

[12] There is no indication from a perusal of the file as to why the matter was not dealt with and disposed of on those previous occasions.

application *sine die* with costs being in the cause; the application was reinstated and set down for hearing on 07 November 2017, on which date Notununu AJ (as he then was) further postponed it *sine die* with costs being reserved.

[16] When the matter eventually served before me on 22 May 2018, after having been reinstated by the plaintiff, Mr *Mbiko*, counsel for the defendants, quite correctly in my view, conceded that the affidavit filed in opposition to the summary judgment application was bereft of facts pointing to the existence of a *bona fide* defence to the main action.

[17] It is incumbent on a defendant resisting summary judgment to advance his contentions with a sufficient degree of clarity to enable the court to ascertain whether he has deposed to a defence which, if proved at trial would constitute a good defence to the action.[13] A defendant who advances a defence simply to delay the obtaining of a judgment which the defendant knows the plaintiff is justly entitled to will hardly succeed in resisting the grant of summary judgment.[14] Purely technical deficiencies are not permitted.[15]

[18] The deponent to the opposing affidavit has not come anywhere near denying that the first defendant is still in possession of the motor vehicle. On the defendants' own showing they made payments to the plaintiff. This could only have been pursuant to and in terms of the sale agreement, the existence of which the defendants pitifully dispute.

[19] In my view, the contentions that the *merx* (which happens to be a motor vehicle of which the first defendant is in possession) and that the amount claimed is grossly inflated are a subterfuge and stratagem the objective of which is to frustrate

---

[13] *Maharaj v Barclays National Bank Ltd* 1976 (1) SA 418 (A); *Barclays Western Bank Ltd v Bill Jonker Factory Services (Pty) Ltd and Another* 1980 (1) SA 929 (SECLD).
[14] *Skead v Swanepoel* 1949 (4) SA 763 (T) at 766-7; see also *Van Eeden v Sasol Pensioenfonds* 1975 (2) SA 167 (O).
[15] *Liberty Group Ltd v Sing and Another* [2012] ZAKZDHC33; 2012 (5) SA 526 (KZD) paras 43-4.

the application for summary judgment. This is especially so if one has recourse to the fact that all the plaintiff obtained was judgment confirming cancellation of the sale agreement and directing the first defendant to return the motor vehicle to the plaintiff, with the claim for damages standing over for determination on a future date.

[20] The contention based on section 129 of the National Credit Act is similarly unavailing. The relevant notice, a copy of which is annexed to the particulars of claim, belies this contention. There is nothing to gainsay the plaintiff's allegation that the notice was received at the correct post office on 18 April 2017, long before the launch of the action on 29 May 2017.

[21] Small wonder that Mr *Mbiko* was constrained to concede that there was nothing militating against the grant of summary judgment as prayed for by the plaintiff.

[22] I was, and still am, satisfied that the defendants' papers disclosed not a *bona fide* defence, hence I granted the order I did.

____

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

For the plaintiff	:	*D C Botma*
Instructed by	:	J A Le Roux Attorneys Mthatha

For the defendants	:	*V Mbiko*
Instructed by	:	H S Toni Attorneys Mthatha
Defendant's current attorneys of record	:	Mnqayana Attorneys Mthatha
Date application heard	:	22 May 2018
Date order issued (with directive for reasons to be sought by 31 May 2018)	:	22 May 2018
Date reasons sought	:	22 February 2019
Date reasons furnished	:	12 March 2019